December 21, 2018

IRS Issues Proposed Regulations on BEAT

The Proposed BEAT Regulations Provide New Guidance on Significant Aspects of BEAT That Were Not Addressed in the Statute, but Leave Some Questions Unanswered

SUMMARY

On December 13, 2018, the Internal Revenue Service (the "IRS") and the Treasury Department issued proposed regulations (the "Proposed Regulations") on the base erosion and anti-abuse tax ("BEAT"). As discussed below, the Proposed Regulations would clarify some of the key aspects of the BEAT regime, but also include a number of surprises and do not provide specific rules on other issues that could have a critical impact on a taxpayer's ultimate BEAT liability.

Highlights of the Proposed Regulations include the following:

- For purposes of determining whether a "base erosion tax benefit" exists, the Proposed Regulations would not establish any specific rules for determining whether and when a deduction exists, whether a payment gives rise to a deduction or whether a deduction is allowed "with respect to" a payment made to a related foreign person. Rather, the preamble states that these questions must be resolved under general principles of federal income taxation. Existing law may not provide clear guidance in some situations, however, given the novelty of the BEAT regime. *See* Part C.1.
- Exchange losses (so-called "section 988 losses") would be entirely disregarded in the BEAT regime, and would therefore be excluded from both the denominator and the numerator of the Base Erosion Percentage. The preamble explains that exchange losses do not present the same base erosion concerns as other types of losses that arise in connection with payments to a related foreign party. It is not clear, however, why losses arising in transactions with unrelated parties should likewise be excluded from the denominator. *See* Part C.3.
- The Proposed Regulations provide that "the amount of any base erosion payment is determined on a gross basis, regardless of any contractual or legal right to make or receive payments on a net basis." However, the preamble notes that there may be situations where otherwise generally applicable law would require computation to be done on a net basis, suggesting that the legal obligations giving rise to such payments can themselves be netted (or constitute a single obligation). *See* Part C.1.

- The Proposed Regulations would expressly require items to be annually determined on a net basis where the taxpayer has adopted a mark-to-market method of accounting. This should serve to limit the duplication of gains and losses in both the numerator and the denominator of the Base Erosion Percentage. *See* Part C.4.
- The Base Erosion Percentage Test with a lower (2%) threshold applies not only to U.S. banks and registered securities dealers, but also to (i) a member of an affiliated group that includes a U.S. bank or registered securities dealer and (ii) any foreign member of an "Aggregate Group" that includes a U.S. bank or registered securities dealer. Foreign banks that are licensed to conduct banking in the U.S. are excluded from the definition of "banks" for this purpose. *See* Part I.1.
- The Proposed Regulations adopt an "add-back" approach to computing modified taxable income, rather than a "recomputation" approach. Significantly, the IRS accepts that the starting point for computing modified taxable income prior to the add-back can be negative if the losses arising in the current year exceed gross income. However, the Proposed Regulations would limit the use of net operating loss carryovers from previous years to gross income for the taxable year. As a result, NOL carryovers cannot offset base erosion payments for the current taxable year. This may increase the significance of the timing of loss recognition. *See* Part F.
- The Proposed Regulations would generally allow the exclusion of "cost plus" payments for services from base erosion treatment under a "bifurcation approach" previously advocated by taxpayers. Only the amount paid in excess of the total cost of services (*i.e.*, the markup component) would be disqualified from the services cost method exception and would therefore give rise to base erosion payments. *See* Part C.3.
- Payments pursuant to any sale-repurchase transaction ("repos") or securities lending transaction would be excluded from the "qualified derivative payments" exception and would therefore give rise to base erosion payments. This might be deemed (for now at least) to include even stock loans, given the technical language of relevant cross-references. *See* Part C.3.
- Interest payments on "total loss-absorbing capacity" ("TLAC") securities issued to foreign parents by U.S. subsidiaries would not be base erosion payments to the extent such issuance was required by the Federal Reserve (and thus interest on such TLAC securities would likewise not be included in the numerator of the Base Erosion Percentage, and would not be included in the denominator either, except to the extent such interest was ECI). However, the Proposed Regulations would not provide similar exceptions for foreign banks that have ECI and that issue debt subject to similar requirements by foreign bank regulators. *See* Parts C.3 and E.1.
- Although not addressed in the Proposed Regulations per se, the preamble specifically references certain nonrecognition transactions (e.g., inbound section 332, section 351 and section 368 transactions, as well as section 721 contributions by a related foreign partner) as potentially giving rise to base erosion tax benefits as a result of non-cash payments or accruals. It is not clear what this means in the context of BEAT. In addition, the preamble states that a loss recognized on a transfer of property to a foreign party could give rise to a base erosion payment, even though such a loss likewise does not result in base erosion and the tax benefits from such a loss to the taxpayer may be limited under the related party transaction rules. *See* Parts C.2 and H.2.
- The Proposed Regulations would generally provide that a foreign corporation that has interest expense allocable to ECI under the existing apportionment and allocation rules of Treasury Regulations Section 1.882-5 will have a base erosion payment to the extent the interest expense results from a deemed payment or accrual to a related foreign party. The Proposed Regulations would not adopt the rule of Section 884(f) that treats the excess of accrued interest expense over booked interest expense as paid to a related foreign parent. Rather, the Proposed Regulations would treat such excess interest as paid to a related foreign parent in proportion to the character of the interest paid by such related foreign parent based on a scaling ratio. *See* Part C.5.
- Partnerships are viewed as aggregates of their partners rather than as entities, and thus payments to and from the partnership are treated as payments to and from the partners for purposes of applying BEAT. *See* Part H.1.

- The status of Section 163(j) interest expense carryovers as base erosion payments would be determined by reference to the year in which the interest expense accrued. The IRS has reversed its position in Notice 2018-28 by providing in the Proposed Regulations that disallowed business interest carried forward from a taxable year prior to January 1, 2018 would not give rise to any base erosion payments. *See* Part D.3.
- Three anti-abuse rules focus on the taxpayer having "a principal purpose" of (i) avoiding base erosion payments by using unrelated intermediaries, (ii) increasing the amount of deductions that go into the denominator of the Base Erosion Percentage through a transaction or plan, and (iii) avoiding the application of rules applicable to banks and securities dealers by engaging in transactions with related parties. *See* Part I.4.

Effective Dates. If finalized on or before June 22, 2019, then the Proposed Regulations would generally apply to taxable years beginning after December 31, 2017. If finalized after June 22, 2019, then such final regulations would generally apply to taxable years ending on or after December 17, 2018.

BACKGROUND

Section 59A of the Internal Revenue Code of 1986, as amended,[1] added by the comprehensive tax reform legislation commonly known as the Tax Cuts and Jobs Act of 2017 (the "TCJA"), introduced the concept of BEAT. Conceptually, BEAT imposes a minimum tax on an alternatively computed tax base of certain taxpayers (both U.S. and non-U.S.) intended, as its name suggests, to reduce the incentive for such taxpayers to make deductible payments to related foreign persons that would reduce the U.S. tax base.

The actual imposition of BEAT works generally in a mechanical manner, requiring the determination of several BEAT-specific items. First, the Applicable Taxpayer (as defined below) must identify all payments to a non-U.S. person deemed to be related to the Applicable Taxpayer under special attribution rules (such payment, a "Base Erosion Payment") and the tax benefits with respect to such Base Erosion Payments (such tax benefit, the "Base Erosion Tax Benefit"). Next, the Applicable Taxpayer must divide the aggregate amount of Base Erosion Tax Benefits for the taxable year by the total amount of deductions and any other tax benefits treated as a Base Erosion Tax Benefit for the taxable year (such quotient, the "Base Erosion Percentage"). If the Base Erosion Percentage exceeds 3% (2% in the case of a member of an affiliated group that includes certain financial institutions) (the "Base Erosion Percentage Test"), the Applicable Taxpayer must determine its "modified taxable income," which is the taxpayer's regular taxable income determined without regard to any "Base Erosion Tax Benefit" and the "Base Erosion Percentage" of any net operating loss deduction allowed under section 172 for the taxable year.

Once such BEAT-specific items are determined, the amount of tax imposed by the BEAT (the "Base Erosion Minimum Tax Amount" or "BEMTA") on the Applicable Taxpayer equals the excess (if any) of

[1] References herein to a "Section" are to sections of the Code and the Treasury regulations ("Treasury Regulations" or "Treas. Reg.") promulgated thereunder.

(i) the "BEAT Rate"[2] multiplied by modified taxable income over (ii) the regular tax liability of the taxpayer reduced by certain credits.

Only a corporate taxpayer that meets the following conditions is subject to BEAT (such taxpayer, an "Applicable Taxpayer"): (i) it is not a regulated investment company ("RIC"), real estate investment trust ("REIT") or S corporation; (ii) it has average annual gross receipts of at least $500 million for the 3-taxable-year-period ending with the preceding taxable year (the "Gross Receipts Test"); and (iii) it meets the Base Erosion Percentage Test. For purposes of the Gross Receipts Test and Base Erosion Percentage Test, special aggregation rules apply to treat a group of corporations under common control as one person (such aggregated corporations, the "Aggregate Group").

DISCUSSION

Despite the relatively mechanical nature of BEAT, the statutory language does not address a number of issues pertinent to computing BEAT liability. The Proposed Regulations would provide guidance to clarify some of the major ambiguities in the statute. This memorandum discusses some of the most important provisions of the Proposed Regulations and highlights other key issues that remain unsolved.

A. APPLICABLE TAXPAYER

1. Aggregate Group approach for determining gross receipts and the Base Erosion Percentage

As mentioned above, special aggregation rules apply for purposes of determining whether a corporation has met the Gross Receipts Test and the Base Erosion Percentage Test to be an Applicable Taxpayer. More specifically, the Proposed Regulations would provide that a corporation determines whether it meets the Gross Receipts Test and the Base Erosion Percentage Test by taking into account the gross receipts and the Base Erosion Percentage of an Aggregate Group that includes the taxpayer, where applicable.[3] The Aggregate Group is determined as of the end of the taxpayer's taxable year for which BEAT liability is being computed.[4]

2. Definition of Aggregate Group

An Aggregate Group is a group of corporations that are generally connected by 50% of common ownership (by vote or value) after giving effect to certain attribution rules, including foreign corporations to the extent that they have income that is effectively connected with the conduct of a trade or business in

[2] The BEAT Rate is 5% for taxable years beginning in 2018, 10% taxable years thereafter until 2025, and 12.5% for taxable years beginning after December 31, 2025. Prop. Treas. Regs. § 1.59A-5(c)(1). In addition, each of the percentages mentioned in the preceding sentence is increased by 1% for a member of an affiliated group that includes a bank or a registered securities dealer (*i.e.*, 6% in 2018, 11% until 2025, and 13.5% thereafter). Prop. Treas. Regs. § 1.59A-5(c)(2).

[3] Prop. Treas. Regs. § 1.59A-2(c).

[4] *Id*.

the United States ("ECI") or are otherwise subject to U.S. net income taxes under an applicable tax treaty.[5]

3. Payments between Aggregate Group members

The Proposed Regulations would generally provide that payments between members of the Aggregate Group are (i) not included in the gross receipts of the Aggregate Group for purposes of applying the Gross Receipts Test, and (ii) not taken into account for purposes of determining the numerator or the denominator in the Base Erosion Percentage calculation.[6] The combination of this rule and the definition of Aggregate Group would be consistent with the single entity concept provided by the aggregation rules and also with the overall goal of BEAT to apply with respect to payments that serve to reduce the U.S. tax base.

B. GROSS RECEIPTS

1. Distributive share of partnership gross receipts

For purposes of the Gross Receipts Test, the Proposed Regulations would require a member of an Aggregate Group that owns partnership interests to take into account the member's distributive share of the partnership's gross receipts. Such distributive share of gross receipts would be proportionate to the corporate partner's distributive share of items of gross income from the partnership.[7]

2. Other mechanical clarifications for gross receipt calculation

Under the Proposed Regulations, if a taxpayer has been in existence for less than 3 years, the taxpayer would account for the average gross receipts during the years in existence, and if the taxpayer has been in existence for less than 12 months, gross receipts would be annualized by multiplying the gross receipts for the short period by 365 and dividing the result by the number of days in the short period.[8]

In addition, the Proposed Regulations would clarify how to determine gross receipts for certain specific situations, including the determination of gross receipts where members of the Aggregate Group have different taxable years and the inclusion of the gross receipts of a "predecessor" from which a corporation has acquired assets in a transaction described in section 381(a) of the Code (generally, a tax-free acquisition of substantially all of another corporation's assets).[9]

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5 Prop. Treas. Regs. § 1.59A-1(b)(1)(ii). The preamble notes that two payments from a domestic corporation to a related foreign corporation may be treated differently for purposes of determining Applicable Taxpayer status if one payment subjects the payee to U.S. net income tax and the other payment does not.

6 Prop. Treas. Regs. § 1.59A-2(c).

7 Prop. Treas. Regs. § 1.59A-7(b)(5)(ii).

8 Prop. Treas. Regs. § 1.59A-2(d)(7).

9 Prop. Treas. Regs. § 1.59A-2(d)(2) & (f), Example 2; Prop. Treas. Regs. § 1.59A-2(d)(8).

C. BASE EROSION PAYMENT

1. Application of general tax law principles to determine Base Erosion Payments

As provided in the statute, the Proposed Regulations would provide that a Base Erosion Payment is an amount paid or accrued by a taxpayer to a foreign related party (taking into account special attribution rules) that is described in one of four specific categories: (1) a payment with respect to which a deduction is allowable; (2) a payment made in connection with the acquisition of depreciable or amortizable property; (3) certain premiums or other consideration paid or accrued for reinsurance; or (4) a payment resulting in a reduction of the gross receipts of the taxpayer that is with respect to certain surrogate foreign corporations or related foreign persons.[10] Note that the third and fourth categories represent a departure from the general rule that a payment which results in a reduction in gross income rather than a deduction is not a Base Erosion Payment. In addition, the preamble explains that a payment that is not within one of the categories may be a Base Erosion Payment described in one of the other categories, but an amount is taken into account only once even if a payment falls into more than one category.[11]

The Proposed Regulations do not establish any specific rules, however, for determining whether and when a payment exists for purposes of applying BEAT, whether any such payment gives rise to a deduction for purposes of applying BEAT (as opposed, for example, to merely manifesting the fact that the taxpayer does not own the remitted cash), and whether any such deduction is allowed "with respect to" a payment to a related foreign person.[12] Rather, the preamble clarifies that these questions must be resolved under general principles of federal income taxation.

Moreover, the Proposed Regulations would provide that, except as otherwise permitted by the Code or the Treasury Regulations (and the rule regarding mark-to-market deductions discussed in Part C.4 below), the amount of any base erosion payment is determined on a gross basis, regardless of any contractual or legal right to make or receive payments on a net basis. For this purpose, the Proposed Regulations would provide that a "right to make or receive payments on a net basis" permits the parties to a transaction or series of transactions to settle obligations by offsetting any amounts to be paid by one party against amounts owed by that party to the other party. The preamble clarifies, however, that "if there are situations where an application of otherwise generally applicable tax law would provide that a deduction is computed on a net basis (because an item received reduces the item of deduction rather than increasing gross income), the Proposed Regulations do not change that result." It may not be entirely clear where this leaves taxpayers in any particular case.

For example, certain companies under common control can enter into a "cost sharing agreement," under which participants share in the costs and risks of developing intangibles in proportion to their anticipated

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[10] Prop. Treas. Regs. § 1.59A-3(b). For more discussion of insurance premiums, *see* Part I.2 below.

[11] Preamble p.19.

[12] *See* Prop. Treas. Regs. § 1.59A-3(c)(1).

benefits. The Treasury Regulations governing such cost sharing agreements not only sanction the netting of amounts payable by a participant against the amounts owed to such participant, but also require such netting under certain circumstances.[13] Notwithstanding these circumstances, the extent to which netting would be permitted under the Proposed Regulations is unclear.

Likewise, suppose a taxpayer enters into a single bilateral agreement with an unrelated party that requires it to pay LIBOR on a notional principal amount of $1 million and in return requires the counterparty to pay the taxpayer $30,000 per annum. At the end of the year, LIBOR equals 3% and therefore the taxpayer is obligated to pay the counterparty $30,000, and the counterparty is obligated to pay the taxpayer $30,000, and under these circumstances, the agreement does not require either party to make a cash payment to the other. On its tax return, the taxpayer records $30,000 of gross income offset by a $30,000 deduction. Is the taxpayer entitled to include the $30,000 deduction in the denominator of the fraction that determines its base erosion percentage? Does it matter, in this regard, precisely how the governing document articulates the obligations of the parties (e.g., whether its speaks of one party paying x and the other paying y, or whether it speaks instead of each party paying the other the excess of x over y)?

There are, moreover, a number of characterization questions the answers to which are not immediately apparent under general principles, given the novel statutory framework of BEAT. For example, suppose a taxpayer borrows stock from a related foreign party and sells it short in the marketplace. Later, the taxpayer repurchases substantially similar stock at a higher price and returns it to the foreign related party. Under general tax principles, the taxpayer clearly realizes a loss in respect of this series of transactions and deducts it on its relevant tax return. Is this a deduction allowed, however, with respect to a payment made to a related foreign party? The only payment made here is a payment to an unrelated person in the marketplace. What if the taxpayer is on a mark-to-market method of accounting and so simply takes a deduction at the end of relevant taxable year prior to closing out the relevant short position? Nothing in the language of the Proposed Regulations speaks to how such technical questions are to be resolved.

As another example, the Proposed Regulations do not provide any additional clarification regarding whether a royalty payment can be capitalized into cost of goods sold and therefore avoid being subject to BEAT.

2. Nonrecognition and loss transactions

The Proposed Regulations would clarify that payments or accruals of both cash and non-cash consideration (such as stock or assumption of liability) could be a Base Erosion Payment.[14] Moreover,

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[13] Treas. Regs. § 1.482-7.

[14] Prop. Treas. Regs. § 1.59A-3(b)(2)(i).

the preamble states that even a nonrecognition transaction typically thought of as "tax-free," such as a domestic corporation's acquisition of depreciable assets from a foreign related party in an exchange described in section 351, a liquidation described in section 332 or a reorganization described in section 368, may result in Base Erosion Payments even though the IRS acknowledges in the preamble that there may be no gain or loss recognized by the domestic corporation and no step-up of basis, and that the importation of such depreciable assets may actually increase the U.S. tax base (presumably upon the sale of such assets). It is not clear how transactions can be viewed as giving rise to Base Erosion Payments, however, when the foreign corporation that would otherwise be deemed to receive such payment no longer exists.

Similarly, the preamble states that a payment to a foreign related party resulting in losses recognized by the taxpayer could also be a Base Erosion Payment, except for losses that arise as a result of certain currency exchange.[15] It is not clear how such a loss recognition is viewed as a Base Erosion Payment. It is likewise unclear how the rule would interact with related party transaction rules under Section 267 which disallows or defers deductions for losses arising out of certain transactions with foreign related parties.

3. Exceptions to Base Erosion Payments

The Proposed Regulations delineate several exceptions to Base Erosion Payments, some of which would be clarifications of exceptions expressly provided by the statute, while others would be exceptions created by Proposed Regulations under the statutory grant of authority to the IRS, providing that the IRS can issue regulations or guidance as may be necessary or appropriate to carry out the BEAT provisions.[16]

Services cost method exception. The transfer pricing rules under Section 482 permit certain services to be provided at cost (or with a small markup) under the "services cost method" ("SCM").[17] Under the so-called "SCM exception," a payment for services qualifying under SCM is not Base Erosion Payment, provided that "such amount constitutes the total services cost with no markup component."[18] However, the statutory language left taxpayers questioning whether this meant that a small markup entirely disqualified a payment from the SCM exception, or whether it merely meant that the payment would qualify only to the extent of the services cost.

The Proposed Regulations would resolve the ambiguity in favor of the latter alternative, clarifying that the SCM exception would be available even if there is a markup (assuming that all other requirements for the SCM exception are met), provided that the portion of any payment that exceeds the total cost of services

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15 Preamble, p. 22.

16 *See* section 59A(i).

17 *See* Treas. Regs. § 1.482-9(b).

18 Section 59A(d)(5).

would not be eligible for the SCM exception and would be a Base Erosion Payment.[19] In addition, the taxpayer must comply with certain recordkeeping requirements to permit verification by the Commissioner of the amount charged for the services and the total services costs incurred by the renderer.[20]

Qualified derivative payments exception. The statute also provides that a qualified derivative payment ("QDP") will not be treated as a base erosion payment. A QDP is defined as any payment made by a taxpayer to a foreign related party pursuant to a "derivative" for which (i) the taxpayer recognizes gain or loss on a "mark-to-market" basis, (ii) the gain or loss is ordinary, and (iii) any gain, loss, income or deduction on a payment made pursuant to the derivative is also treated as ordinary.[21] A derivative is defined as a contract the value of which is determined by reference to (but the derivative itself cannot be) stock in a corporation, debt, any actively traded commodity, any currency or any rate, price, amount, index, formula, or algorithm, but excludes certain insurance contracts.[22]

For purposes of the above, the Proposed Regulations would narrow the scope of transactions that would qualify for the QDP exception by specifying certain additional exclusions from the definition of a "derivative contract." More specifically, the Proposed Regulations would provide that "a securities lending transaction, a sale-repurchase transaction, or any substantially similar transaction" would not be a derivative under the Proposed Regulations and thus payments pursuant to such a transaction could give rise to Base Erosion Payments.[23] In particular, the preamble notes that a sale-repurchase ("repo") transaction satisfying certain conditions is treated as a secured loan for tax purposes, and that payments on a loan would be subject to the statutory exclusions from the QDP exception. Moreover, the preamble suggests that a repo transaction and a securities lending transaction are economically similar and thus should be similarly treated for purposes of the QDP exception. As technically drafted, however, the exception may be deemed to extend by cross-reference to stock loans, which are clearly not economically similar to repos. By excluding all repo and securities lending transactions from the definition of derivatives, the IRS appears to have taken the position that all payments pursuant to a repo or a securities lending transaction, including borrow fees and even possibly substitute dividend payments, are economically similar to interest payments that are ineligible for the QDP exception.

Finally, the Proposed Regulations would provide that the QDP exception applies only if certain reporting requirements are met.[24]

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19 Prop. Treas. Regs. § 1.59A-3(b)(3)(i).

20 Prop. Treas. Regs. § 1.59A-3(b)(3)(i)(C).

21 Section 59A(h).

22 Section 59A(h)(4).

23 Prop. Treas. Regs. § 1.59A-5(d)(2)(iii).

24 Prop. Treas. Regs. § 1.6038A-2(b)(7)(ix); Prop. Treas. Regs. § 1.6038A-2(g).

Total loss-absorbing capacity ("TLAC") securities exception. The Proposed Regulations would provide that amounts paid or accrued to foreign related parties with respect to TLAC securities are not Base Erosion Payments.[25] Issued by certain global systemically important banking organizations (GSIBs), TLAC securities are debt securities intended to absorb losses and minimize the risk of insolvency and are required to be issued by GSIBs under the regulations issued by the Board of Governors of the Federal Reserve (the "Board").[26] In particular, the Board regulations require the domestic intermediate holding company of a foreign GSIB to issue a specified minimum amount of TLAC securities to its foreign parent.[27] Given the purpose of such TLAC securities and the extent to which the terms and funding from such TLAC securities are prescribed by the Board regulations, the preamble explains that the IRS found it necessary and appropriate to exclude interest paid or accrued on TLAC securities required by the Federal Reserve. However, the Proposed Regulations would also provide that the TLAC securities exception would apply only to the extent of the amount of TLAC securities required by the Board regulations, and accordingly, the exception is scaled back if the average amount of TLAC securities issued and outstanding exceeds the amount required.[28] For example, if the average amount of TLAC securities required by the Board regulations is 90% of the average amount of TLAC securities issued and outstanding for the taxable year,[29] then only 90% of the payments paid or accrued with respect to TLAC securities are eligible for the TLAC securities exception. Foreign banks, however, that have ECI and that issue debt subject to similar requirements by foreign bank regulators do not benefit from an exception from BEAT for such issuances.

Effectively connected income exception. The Proposed Regulations would exclude from the definition of Base Erosion Payment any payments or accruals to a foreign person to the extent that such payments or accruals are ECI (and the foreign person has provided a withholding certificate claiming an exemption from withholding taxes because the amounts are ECI),[30] on the basis that those amounts are subject to U.S. taxation in substantially the same manner as amounts paid to a U.S. person. Similarly, where a foreign recipient determines its net taxable income under an applicable U.S. income tax treaty, payments

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[25] Prop. Treas. Regs. § 1.59A-3(b)(3)(v)(A).

[26] Prop. Treas. Regs. § 1.59A-1(b)(20), citing 12 C.F.R. § 252.161.

[27] Prop. Treas. Regs. § 1.59A-1(b)(18), citing 12 C.F.R. § 252.162(a).

[28] Prop. Treas. Regs. § 1.59A-3(b)(3)(v)(B).

[29] The amount of TLAC securities issued and outstanding is the sum of the adjusted issue prices of all TLAC securities issued and outstanding by the taxpayer. Prop. Treas. Regs. § 1.59A-1(b)(19). In order to compute the average amounts for the year, the amount of required TLAC securities and the amount of total issued and outstanding TLAC securities are each computed on a monthly basis. Prop. Treas. Regs. § 1.59A-3(b)(3)(v)(C)-(E).

[30] Prop. Treas. Regs. § 1.59A-3(b)(3)(iii)(A).

taken into account in determining net taxable income under the treaty are excluded from Base Erosion Payments.[31]

Exchange loss exception. Generally, any payment to a foreign related party resulting in a recognized loss would be a Base Erosion Payment, but the Proposed Regulations would provide that exchange losses from certain transactions involving nonfunctional currency (*i.e.*, "section 988 losses") are not Base Erosion Payments.[32] As discussed in Part E.1 below, the Proposed Regulations would also exclude all section 988 losses from the denominator of the Base Erosion Percentage.

4. Mark-to-market deductions

The Proposed Regulations would provide that in order to determine the amount of Base Erosion Payment for any amounts paid or accrued with respect to any transaction to which the taxpayer applies the mark-to-market ("MTM") method, the taxpayer must determine its gain or loss with respect to that position for any taxable year by combining all items of income, deduction, gain, or loss arising with respect to the position during the taxable year regardless of how each item arises. Furthermore, the Proposed Regulations would provide that a taxpayer computes its losses resulting from MTM based on a single mark for the taxable year, on the earlier of the last business day of the taxable year or the disposition ("whether by sale, offset, exercise, termination, expiration, maturity, or other means") of the position.[33] The preamble explains that this rule ensures that only a single deduction is claimed with respect to each transaction, and that the rule is intended to prevent distortions in deductions from being included in the denominator of the Base Erosion Percentage.

For example, suppose that on January 1 of Year 1, a domestic corporation ("Taxpayer") enters into an interest swap with an *unrelated* counterparty that requires two semi-annual payments of $50 by the taxpayer, and such swap is entered into at-the-money (*i.e.*, the fair value to either party is zero). Suppose that as of the end of Year 1, the value of the swap to Taxpayer is $60, and that the swap was not disposed of. The net of all of the payments and the mark on the last business day of the taxable year is negative $40 ($100 of payments offset by $60 MTM gain), and thus $40 of deduction is included in the denominator of the Base Erosion Percentage, which reflects Taxpayer's net economic position with respect to the swap. However, in the absence of the MTM rules described above, Taxpayer could potentially view the $100 payment and $60 MTM gain separately, distorting the amount of deductions included in the denominator of the Base Erosion Percentage. Moreover, such distortions are exacerbated in the absence of the MTM rules if the swap is valued more frequently than annually, such that multiple loss positions during the year could be included in the denominator of the Base Erosion Percentage even if the value of the swap position at the end of year is positive.

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[31] Prop. Treas. Regs. § 1.59A-3(b)(3)(iii)(B).

[32] Prop. Treas. Regs. § 1.59A-3(b)(3)(iv).

[33] Prop. Treas. Regs. § 1.59A-3(b)(2)(iii); Prop. Treas. Regs. § 1.59A-2(e)(3)(vi).

5. Interest expense and other deduction allocations in the case of ECI

As described above, BEAT applies to foreign corporations that have income subject to U.S. net income taxation as ECI, taking into account any applicable income tax treaty. The Proposed Regulations would generally provide that a foreign corporation that has interest expense allocable to ECI under existing apportionment and allocation rules of Treasury Regulations Section 1.882-5 can have a Base Erosion Payment to the extent the interest expense results from a deemed payment or accrual to a foreign related party. The Proposed Regulations would not adopt the rule of Section 884(f), however, that treats the excess of accrued interest expense over booked interest expense (generally referred to as excess interest) as paid to a related foreign parent. Rather, the Proposed Regulations would treat such excess interest as paid to a related foreign parent in proportion to the character of the interest paid by such related foreign parent based on a scaling ratio (that is, depending on the portion of the foreign parent's total liabilities that consist of liabilities due to foreign related parties).

6. Payments to certain domestic passthroughs with foreign owners or to another member within the Aggregate Group

The Proposed Regulations would essentially adopt a look-through rule with respect to deductible payments to a "specified domestic passthrough" and treat such payments as being made to its foreign beneficiaries, thereby potentially treating such amounts as Base Erosion Payments.[34] For this purpose, a "specified domestic passthrough" is generally a domestic trust that is not a grantor trust, a REIT or a RIC, each of which makes deductible payments or distributions to foreign beneficiaries.[35]

In addition, the Proposed Regulations would provide rules for transfers of certain property from a member to another member within the same Aggregate Group, to ensure that any depreciation or amortization by the transferee taxpayer remains a Base Erosion Tax Benefit to the same extent applicable to the transferor.[36]

D. BASE EROSION TAX BENEFIT

As provided by the statute, a Base Erosion Tax Benefit is the tax benefit (*i.e.*, a deduction or a reduction in gross income, as applicable) allowed for each of the four categories of Base Erosion Payments discussed above in Part C.1.[37] The Proposed Regulations would provide additional guidance necessary to determine the amount of Base Erosion Tax Benefits for the taxable year.

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[34] Prop. Treas. Regs. § 1.59A-3(b)(2)(v)(A).

[35] Prop. Treas. Regs. § 1.59A-3(b)(2)(v)(B).

[36] Prop. Treas. Regs. § 1.59A-3(b)(2)(vi).

[37] *See* Section 59A(c)(2); Prop. Treas. Regs. § 1.59A-3(c).

1. Withholding tax on payments

The Proposed Regulations would clarify that, for purposes of determining the amount of Base Erosion Tax Benefits, a Base Erosion Payment subject to full U.S. withholding taxes (generally at 30%) would be treated as having a Base Erosion Tax Benefit of zero, but to the extent an income tax treaty reduces the amount of withholding imposed on the Base Erosion Payment, the Base Erosion Payment would be treated as having a Base Erosion Tax Benefit proportional to the relative reduction in the withholding tax rate applicable to such withholding.[38] For example, if the withholding rate is reduced by 50% (from 30% to 15%), then 50% of the Base Erosion Payment would be included as a Base Erosion Tax Benefit.

2. Classifying deductions for interest expense that are limited under section 163(j)

The statute provides that when the amount of deductions allowed for interest expense are reduced due to the limitation under section 163(j), such reduced amount is treated as allocable first to interest paid or accrued to unrelated parties, and then to related parties.[39] However, the statute does not provide guidance on the allocation between domestic and foreign related parties.

The Proposed Regulations would adopt a proportionate allocation method. If any interest expense deduction is disallowed for the taxable year under section 163(j), such disallowed amounts would first be treated as allocable to unrelated parties (in accordance with the statute), and then *proportionately* allocated between domestic and foreign related parties.[40]

In addition, in the case in which a taxpayer has a disallowed interest expense carryforward, the Proposed Regulations would follow the "year-by-year" ordering rule provided by the regulations proposed under section 163(j) to determine which interest expenses are deducted first: business interest expense incurred in the current taxable year will be deducted first, and then business interest expense carryforwards from prior years (starting with the earliest year).[41]

3. Tax benefits related to pre-2018 payments and reversal of Notice 2018-28

Under the TCJA, BEAT is applicable only with respect to Base Erosion Payments paid or accrued in taxable years after December 31, 2017 (the "BEAT Effective Date").[42] Given that the statutory definition of Base Erosion Tax Benefit that is based upon the definition of Base Erosion Payment, the Proposed Regulations would clarify that a deduction, depreciation or amortization relating to a Base Erosion Payment that occurred before January 1, 2018 is not a Base Erosion Tax Benefit. For example,

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38 Prop. Treas. Regs. § 1.59A-3(c)(2) & (3).

39 Section 59A(c)(3).

40 Prop. Treas. Regs. § 1.59A-3(c)(4).

41 Prop. Treas. Regs. § 1.59A-3(c)(4)(ii).

42 Section 14401(e) of TCJA.

depreciation in 2018 for property acquired in 2017 from a foreign related person is not a Base Erosion Tax Benefit.

Furthermore, the Proposed Regulations would not follow the approach described in Notice 2018-28, in which the IRS had stated that business interest carried forward from a taxable year beginning before January 1, 2018 will be treated in the same manner as interest paid or accrued in a taxable year beginning after December 31, 2017. Instead, the Proposed Regulations would provide that any disallowed business interest that is carried forward from a taxable year beginning before January 1, 2018, would be excluded from Base Erosion Payments.[43] Using the same logic more generally, the Proposed Regulations would provide that any disallowed business interest carryforward that resulted from a payment or accrual to a foreign related party is treated as a base erosion payment in the year that the interest was paid or accrued even though the interest may be deemed to be paid or accrued again in the year in which it is actually deducted.[44]

E. BASE EROSION PERCENTAGE

1. Items excluded from the numerator and/or the denominator

Under the statute, the Base Erosion Percentage is computed by dividing (1) the aggregate amount of Base Erosion Tax Benefits (the "Numerator") by (2) the sum of the aggregate amount of deductions allowable to the taxpayer plus certain other Base Erosion Tax Benefits (the "Denominator"). For this purpose, certain types of deductions are specifically excluded from the Denominator. In addition to reiterating the three statutory exclusions of certain types of deduction from the Denominator,[45] the Proposed Regulations would (i) add two new exclusions for deductions relating to payments that have also been excluded from the definition of Base Erosion Payment—the TLAC securities exception and the exchange loss exception, and (ii) clarify that any deduction not allowed in determining taxable income for the taxable year will also be excluded from the Denominator.[46] Note, however, that if a payment is not a Base Erosion Payment under both (i) the ECI exception and (ii) any one of the exceptions for SCM, the QDP or the TLAC securities, then such payment will still be included in the Denominator.

Further, with respect to mark-to-market positions, the Proposed Regulations would apply the same principles described above in Part C.5 in order to determine the amount includable in the Numerator and/or the Denominator.

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43 1.59A-3(b)(3)(vii).

44 Prop. Treas. Regs. § 1.59A-(b)(4)(vi).

45 The three statutory exclusions are: (i) any deduction allowed under section 172, 245A, or 250 for the taxable year, (ii) deductions with respect to payments falling under the SCM exception, and (iii) the QDP exception. *See* section 59A(c)(4)(B); *see also* Prop. Treas. Regs. § 1.59A-1(e)(ii)(A)-(C).

46 Prop. Treas. Regs. § 1.59A-1(e)(ii)(D)-(F).

However, due to the rule that the taxpayer should rely on general principles of tax law to determine, for example, how much and which items are deductions that are included within the Numerator and the Denominator, the Proposed Regulations would leave the taxpayer with the same uncertainties discussed in Part C.1 with respect to the calculation of the Base Erosion Percentage.

2. Other mechanical clarifications for Base Erosion Percentage calculation

The Proposed Regulations would also provide other clarifications to the mechanical computation of the Base Erosion Percentage, including such computation when members of an Aggregate Group have different taxable years.

F. MODIFIED TAXABLE INCOME

1. Computation method

The Proposed Regulations would provide several important clarifications on the manner in which the modified taxable income ("MTI") would be calculated.

First, the computation of MTI would be done on a taxpayer-by-taxpayer basis, *i.e.*, the Aggregate Group concept is used solely for determining whether a taxpayer is an Applicable Taxpayer and such taxpayer's Base Erosion Percentage of any net operating loss ("NOL") deduction. As noted in Part I.3 below, however, a consolidated group constitutes a single taxpayer for this purpose.

Second, the computation of MTI would be done on a so-called "add-back" basis, whereby the taxpayer would start with the taxable income (or loss, as discussed further below in the next section) as computed for regular tax purposes, and add to such amount (i) the gross amount of Base Erosion Tax Benefits for the taxable year and (ii) the Base Erosion Percentage of any NOL deduction under section 172 for the taxable year.[47] Because the relevant statutory language for computing MTI provides that the MTI is "the taxable income of the taxpayer. . . determined without regard to" the two items above,[48] it was unclear whether MTI should be computed under a so-called "recomputation approach" whereby various tax attributes (such as NOL and disallowed business interest expense carryforwards) would need to be recomputed for purposes of applying BEAT. This would have required the taxpayer to keep track parallel attributes in a manner similar to the corporate alternative minimum tax (AMT) repealed by the TCJA. The preamble states that the IRS would reject the recomputation approach in order to achieve simplicity.[49]

47 Prop. Treas. Regs. § 1.59A-4(b).

48 Section 59A(c)(1).

49 Similarly, the IRS has proposed the add-back approach in computing the "adjusted taxable income" for purposes of determining a taxpayer's limitation for interest deduction under section 163(j), which presents similar issues of complexity under the recomputation approach. Prop. Treas. Regs. § 1.163(j)-1(b)(1).

2. Current year losses and excess NOL carryovers

The Proposed Regulations would also clarify the treatment of current year losses versus excess NOL carryovers in determining the "starting" point for computing MTI (*i.e.*, before the "add back" of the items discussed above). First, the preamble and an example in the Proposed Regulations would accept the idea that current year losses exceeding gross income can result in negative taxable income (*i.e.*, a taxable loss) as the starting point for computing MTI.[50] At the same time, however, the Proposed Regulations would also deny the use of any excess NOL carryovers from previous years to reduce taxable income below zero. According to the preamble, this denial is intended to prevent using the same NOL carryover repeatedly to reduce BEAT liability in the absence of a parallel tracking of NOLs solely for BEAT purposes (as might have been the case under the recomputation approach discussed above). The divergence in the proposed treatments of current year losses and NOL carryovers would result in a disconnect based on the timing of loss recognition. For example, a sufficiently large loss incurred on the first day of the current year could completely offset BEAT liability for the year, whereas the same loss incurred on the last day of the previous year could not.

3. Determining the Base Erosion Percentage of NOL deductions

As described above, one of the two items added back to the regular taxable income in order to compute MTI is the Base Erosion Percentage of any NOL deduction allowed for the taxable year. The Proposed Regulations would clarify that for purposes of the add-back, the Base Erosion Percentage used is that of the year in which the loss arose, or "vintage year."[51] The preamble explains that the Base Erosion Percentage of the vintage year reflects the portion of base eroding payments that is effectively included in the NOL carryover, and also provides taxpayers with greater certainty as to the amount of the future add-back to MTI compared to an alternative approach that would use the Base Erosion Percentage of the year of NOL utilization, since the vintage year's Base Erosion Percentage is a fixed percentage.[52] Based on the vintage year approach, the add-back amount with respect to any NOLs arising prior to January 1, 2018 would be zero, since the Base Erosion Percentage for any year prior to 2018 would be zero.[53] In addition, the Proposed Regulations would clarify that the relevant Base Erosion Percentage is that of the Aggregate Group used for the taxpayer's Base Erosion Percentage Test, and not the Base Erosion Percentage computed solely by reference to the single taxpayer.[54]

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[50] *See* Prop. Treas. Regs. § 1.59A-4(b) and Example 1, Prop. Treas. Regs. § 1.59A-4(c)(1).

[51] Prop. Treas. Regs. § 1.59A-4(b)(2)(ii).

[52] Preamble, p. 50.

[53] Prop. Treas. Regs. § 1.59A-4(b)(2)(ii).

[54] Prop. Treas. Regs. § 1.59A-2(c).

G. BASE EROSION MINIMUM TAX AMOUNT

As described above, the actual amount of a taxpayer's BEAT liability is the Base Erosion Minimum Tax Amount ("BEMTA"), which is the excess of the taxpayer's (i) BEAT Rate multiplied by MTI, over (ii) regular tax liability reduced (but not below zero) by the amount of certain credits (including foreign tax credits) allowed (such reduced regular tax liability, the "Adjusted Regular Tax Liability").[55] The Proposed Regulations would make two clarifications with respect to how certain credits affect Adjusted Regular Tax Liability.

First, credits for overpayment of taxes and for taxes withheld at source would not reduce the taxpayer's Adjusted Regular Tax Liability for purposes of the BEMTA calculation.[56] The preamble explains that it would be inappropriate to reduce the Adjusted Regular Tax Liability (and thus increase BEAT liability) for such credits, since those credits represent federal income tax paid for the current or previous year.

Second, the preamble explains how, in the case where there are substantial foreign tax credits available to offset taxable income, the Proposed Regulations would limit the use of certain other tax credits that would have otherwise resulted in a lower BEAT liability. Under both the statutory language and the Proposed Regulations, research credits and the applicable portion of general business credits that offset a taxpayer's regular tax liability receive special treatment for taxable years beginning before January 1, 2026, because such credits would not reduce the Adjusted Regular Tax Liability (and thus result in lower BEMTA compared if such credits were to reduce the Adjusted Regular Tax Liability). However, because foreign tax credits are used to offset regular tax liability before any other tax credits,[57] if foreign tax credits reduce a taxpayer's regular tax liability to zero or close to zero such that research credits and general business credits cannot be used for the taxable year, the taxpayer will not be able to benefit from the special treatment available for those credits for the purposes of computing BEAT liability for that year. Instead, the taxpayer will be able to benefit only when those credits carried forward are utilized to offset regular tax liability of a future taxable year, provided that such taxable year must begin before 2026.

H. APPLICATION OF BEAT TO PARTNERSHIPS

1. Treatment as aggregates

The Proposed Regulations would generally apply the aggregate theory of partnerships by treating payments to and from the partnership as payments made to and from each partner (in an amount equal to such partner's distributive share).[58] Thus, for example, a payment by a domestic corporation to a domestic partnership with a foreign partner that is related to the domestic corporation would potentially be a Base Erosion Payment, because such payment would be treated as a payment from the domestic

[55] *See* Section 59A(b); Prop. Treas. Regs. § 1.59A-5.

[56] Prop. Treas. Regs. § 1.59A-5(b)(3)(i)(C) & (b)(3)(ii).

[57] *See* Section 26(a).

[58] Prop. Treas. Regs. § 1.59A-7(b).

corporation to such foreign partner based on its distributive share of items of deductions (or other amounts that could be Base Erosion Tax Benefits). Conversely, a payment made by a domestic corporation to a related foreign partnership would not be a base erosion payment, except to the extent that the partnership had foreign partners related to such domestic corporation. However, the Proposed Regulations would provide an exception from the aggregate theory for certain partners that have a small ownership interest in the partnership: a partner would not take into account its distributive share of Base Erosion Tax Benefit if such partner generally owns less than 10% of the partnership interests, representing a fair market value of less than $25 million.[59]

2. Nonrecognition transactions

As is the case with corporate nonrecognition transactions discussed above in Part C.2, partnership nonrecognition transactions could also give rise to BEAT liability. For example, the preamble states that where an Applicable Taxpayer and a foreign related party form a partnership and the foreign related party contributes depreciable property to the partnership in a transaction under section 721, the Applicable Taxpayer's distributive share of depreciation deductions of the property generally would be a Base Erosion Tax Benefit.[60]

I. OTHER SPECIAL RULES

1. Banks and Registered Securities Dealers

As described above, the Proposed Regulations would confirm that a lower threshold for the Base Erosion Percentage Test and a higher BEAT Rate applies with respect to a taxpayer that is a member of a "1504 affiliated group" (generally domestic corporations connected by an 80% chain of ownership[61]) which includes a bank or a registered securities dealer. Further, if a taxpayer is a member of a 1504 affiliated group that includes a bank or a registered securities dealer, then other members within the same Aggregate Group would also be subject to the lower threshold for purposes of the Base Erosion Percentage Test. The Proposed Regulations would provide exceptions to the above, where a 1504 affiliated group or an Aggregate Group would not be subject to the lower threshold for the Base Erosion Percentage Test if the bank or registered securities dealer activities are below a 2% de minimis threshold relative to other activities of the group.

The Proposed Regulations would not modify the statutory definitions of a "bank" for BEAT purposes. Since the statutory definition of banks only includes those incorporated under the laws of the United States, foreign banks licensed to conduct a banking business in the United States and subject to taxation with respect to ECI are not included in this definition.[62] In addition, the Proposed Regulations would clarify

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[59] Prop. Treas. Regs. § 1.59A-7(b)(4).

[60] Preamble, p. 54.

[61] *See* Section 1504(a).

[62] Section 59A(b)(3)(B)(i); Prop. Treas. Regs. § 1.59A-1(b)(4).

that "registered securities dealer" only includes dealers and not brokers, as such terms are used under securities law.[63]

2. Insurance Companies

The Proposed Regulations would confirm that premiums or other consideration for indemnity reinsurance paid or accrued to foreign related parties are Base Erosion Payments, even though such amounts are "above-the-line" reductions to gross income rather than deductions.[64]

In addition, the preamble explains that while the IRS is aware that certain reinsurance agreements provide that amounts paid to and from a reinsurer are settled on a net basis or netted under the terms of the agreement (e.g., modified coinsurance), the Proposed Regulations would not permit netting in such circumstances because the BEAT statutory framework is based on including the gross amount of Base Erosion Payments in MTI without regard to reciprocal obligations or payments that are taken into account in the regular taxable income base, but not in MTI.[65] The IRS is requesting comments, however, as to whether it would be appropriate to distinguish between reinsurance contracts that provide for netting and other netting arrangements.

The preamble also recognizes that under current law, there is a disparity in the treatment of domestic life insurance companies and non-life insurance companies that may lead to asymmetric outcomes for BEAT purposes. More specifically, certain payments incurred by domestic insurance companies that provide reinsurance to related foreign insurance companies are (i) deductible payments that would potentially be a Base Erosion Payment, in the case of a domestic life insurance company, or (ii) payments that reduce gross income that would not be a Base Erosion Payment, in the case of a domestic non-life insurance company. The IRS is requesting further comments on the appropriate treatment of these items.

3. Consolidated Group

The Proposed Regulations would generally provide that affiliated corporations filing consolidated returns ("consolidated group") are treated as a single entity for BEAT purposes. Accordingly, intercompany transactions between consolidated group members such as interest payments on intercompany obligations or increased depreciation deductions resulting from intercompany sales are disregarded. Note that the consolidated group is a distinct concept from the Aggregate Group, which only exists for purposes of the Gross Receipts Test and Base Erosion Percentage Test.

4. Anti-Abuse Rule

The Proposed Regulations would contain three anti-abuse rules targeting specific transactions that are clearly abusive. First, if a taxpayer pays or accrues an amount to an intermediary who then makes a

[63] Prop. Treas. Regs. § 1.59A-1(b)(15).

[64] Prop. Treas. Regs. § 1.59A-3(b)(1)(ii).

[65] *See* discussion above in Part C.1 regarding the general rule against netting payments.

corresponding payment to a foreign related party (of the taxpayer) in a plan that has a principal purpose of avoiding or reducing a Base Erosion Payment, then the intermediary would be disregarded as a conduit and the payment would be treated as a Base Erosion Payment (as if the taxpayer directly paid the foreign related party). Second, a transaction, plan or arrangement that has a principal purpose of increasing deductions included in the Denominator of the Base Erosion Percentage would be disregarded. For example, if a taxpayer, with a principal purpose of increasing deductions included in the Denominator, simultaneously enters into a long position and a short position for the same asset with unrelated parties, then such transactions are disregarded in computing the Base Erosion Percentage.[66] Third, a transaction, plan or arrangement *between related parties* that has a principal purpose of avoiding the lower Base Erosion Percentage threshold or the higher BEAT Rate applicable to banks and registered securities dealers is not taken into account for purposes of determining such items. It is not clear whether the relatively narrow drafting of these rules implies that a transaction that does not fall within their descriptions will not be challenged.

J. EFFECTIVE DATE AND COMMENT PERIOD

If finalized, the Proposed Regulations (other than the proposed reporting requirements for QDPs) would generally apply to taxable years beginning after December 31, 2017.[67] However, if any provision is finalized after June 22, 2019, then the IRS expects that such provision will apply only to taxable years ending on or after December 17, 2018.[68]

Until finalization, taxpayers may rely on the Proposed Regulations, provided that taxpayers and related parties of the taxpayer apply the Proposed Regulations consistently for all those taxable years that end before the finalization date.[69] Written comments to the Proposed Regulations must be received by the IRS by February 19, 2019.

K. REQUESTED COMMENTS AND OPEN ISSUES

In the preamble to the Proposed Regulations, the IRS and the Treasury Department also invited taxpayer comments on a variety of issues, whether addressed in the Proposed Regulations or reserved for future guidance, including:

- the Aggregate Group for purposes of the Gross Receipts Test and the Base Erosion Percentage Test
- the treatment of payments or accruals that consist of non-cash consideration
- whether the IRS should permit simplifying elections for determining the portion of U.S.-connected liabilities that are paid to a foreign related party similar to those available under Treasury Regulations section 1.882-5

66 *See* Prop. Treas. Regs. § 1.59A-(c)(4), Example 5.

67 Preamble, p. 73; *see also* section 7805(b)(2).

68 Preamble, p. 74; *see also* section 7805(b)(1)(B).

69 Preamble, p. 73; *see also* section 7805(b)(2).

- whether the regulations should adopt the interpretation of section 59A(d)(5) whereby the SCM exception is unavailable to a payment that includes any mark-up component
- whether regulations should further clarify the statutory provisions regarding exceptions from QDP for payments otherwise treated as Base Erosion Payments
- whether securities lending transactions and sale-repurchase transactions have been properly excluded from the definition of a derivative, including whether certain transactions lack a significant financing component such that those transactions should be treated as derivatives for purposes of the QDP exception, and whether any additional transactions or financial instruments should be explicitly excluded from the definition of a derivative
- the treatment of section 988 losses in the context of BEAT, including whether the rule relating to section 988 losses in the denominator of the base erosion percentage calculation should be limited to transactions with a foreign related party
- regarding an exception similar to the TLAC securities exception for foreign corporations that are required by law to issue a similar type of loss-absorbing instrument, including the appropriate scope of an exception that would provide parity between the treatment of domestic corporations and foreign corporations engaged in a U.S. trade or business
- the treatment of disallowed disqualified interest under section 163(j) from a taxable year beginning before January 1, 2018
- the add-back approach provided in the proposed regulations, and the practical effects of an alternative recomputation-based approach.
- the vintage-year approach to the Base Erosion Percentage of NOL deductions as well as the alternative utilization-year approach
- the approach to partnerships as well as the exception for small ownership interests, including the specific thresholds for the exception
- the scope of the de minimis rule for banks and registered securities dealers
- whether a distinction should be made between reinsurance contracts entered into by an applicable taxpayer and a foreign related party that provide for settlement of amounts owed on a net basis and other commercial contracts entered into by an applicable taxpayer and a foreign related party that provide for netting of items payable by one party against items payable by the other party in determining that net amount to be paid between the parties
- whether the regulations should provide that a life insurance company that reinsures foreign risk is treated in the same manner as a non-life insurance company that reinsures foreign risk
- The Treasury Department's projection that the proposed regulations will have a non-revenue effect on the economy of at least $100 million per year (2018) measured against this baseline
- on the proposed forms for reporting and all other aspects of information collection burdens related to the Proposed Regulations

Questions regarding the Proposed Regulations may be directed to any member of the Tax Group.

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